

MEDIATORS REVISED CODE OF PROFESSIONAL CONDUCT

Of the Colorado Council of Mediators and Mediation Organizations

Colorado Council of Mediators and Mediation Organizations (CCMO)

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Introductory Note

The Colorado Council of Mediators and Mediation Organizations ("CCMO") revised Code of Professional Conduct for Mediators is based in large part on the standards of conduct fashioned by the Joint Committee on Standards of Conduct, which was initiated by the American Arbitration Association, the American Bar Association and the Society of Professionals in Dispute Resolution. CCMO gratefully acknowledges the work of this group.

Preface

Mediation is a process in which an impartial third party, a mediator, facilitates the resolution of a dispute by promoting voluntary agreement (or "self-determination") by the parties to the dispute. The Mediators Revised Code Of Professional Conduct gives meaning to this definition of mediation.

This code of conduct is intended to perform three major functions: first, to serve as a guide for the conduct of mediators; second, to inform the mediating parties; and third, to foster public confidence in mediation as a process for resolving disputes. To further promote such public confidence, mediators are encouraged to engage in efforts to educate the public about the value and use of mediation, provide pro bono mediation service and assist new practitioners in the field. The code is intended to be a dynamic document and mediators are encouraged to participate in an ongoing dialogue with respect to the code, its meaning and its ramifications.

I. Self Determination: A mediator should recognize that mediation is based on the principle of self-determination by the parties.

Self-determination is the fundamental principle of mediation. The mediator should rely upon and encourage the ability of the parties to reach a voluntary, uncoerced agreement. The parties decide whether and under what conditions they will reach an agreement or terminate mediation.

COMMENTS:

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- The mediator's primary role is to facilitate the voluntary resolution of disputes. The mediator should provide information about the process, define issues, and help parties explore options. A mediator should ensure that the parties have the opportunity to consider all proposed options and to accept or reject them.
- A mediator cannot personally guarantee that a party has made a fully informed choice in reaching an agreement, but the mediator should ensure that the parties are aware of the importance of making informed decisions and, where appropriate, the value of consulting other professionals.

II. Impartiality: A mediator should conduct the mediation in an impartial manner.

The concept of mediator impartiality is central to the mediation process. A mediator should mediate only those matters in which the mediator can remain impartial and evenhanded. If the mediator is unable to conduct the process in an impartial manner, the mediator should withdraw.

COMMENTS:

- A mediator should avoid conduct that gives the appearance of partiality toward one of the parties. The quality of the mediation process is enhanced when the parties have confidence in the impartiality of the mediator.
- The primary purpose of a mediation is to facilitate a voluntary agreement. A mediator should therefore refrain from providing professional advice, and should recommend, where appropriate, that parties seek outside professional advice, including legal advice.

III. Conflict of Interest: A mediator should avoid involvement where it may be inferred that the private interests of the mediator could conflict with those of a party.

A mediator should avoid conflicts and the appearance of conflicts of interest that could reasonably be seen as raising a question about the mediator's neutrality. A mediator should disclose all actual and potential conflicts of interest reasonably known to the mediator. If all parties agree to mediate after being informed of actual or potential conflicts, the mediator may proceed with the mediation. If, however, the conflict of interest appears to be so severe that it casts serious doubt on the integrity of the process, the mediator should decline to proceed.

COMMENTS:

- There may be strong pressures on the mediator to settle a particular case or cases. The mediator's commitment should be to the parties and the process. Pressures from outside of the mediation process should never influence the mediator to coerce parties to settle.
- A mediator should disclose any potential conflicts of interest in recommending the services of individual professionals. Alternatively, a mediator may make reference to professional referral services or associations that maintain rosters of qualified professionals.

- A mediator should continue to avoid the appearance of a conflict of interest during and after the mediation. Without the consent of all parties, a mediator should not subsequently become the representative for one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process.

IV. Competence: A mediator should mediate only when the mediator has the necessary qualifications.

Any person who offers to serve as a mediator gives the parties and the public the expectation that the mediator has the competency to mediate effectively. Training and education in mediation are necessary for effective mediation. The mediator should also have familiarity with the general principles and law governing any area in which the mediator is willing to serve.

COMMENTS:

- Mediators should refer to the recommended minimum guidelines for the training of domestic and civil mediators endorsed by CCMO and the Colorado Bar Association.
- When a mediator does not possess the required skills, the mediator should seek a co-mediator trained in the necessary discipline, seek the assistance of a substantive expert in the field, or refer cases to other mediators who are trained in the required field of expertise.
- A mediator should have information available for the parties regarding the mediator's relevant training, education and experience.

V. Confidentiality: A mediator should maintain the confidentiality of mediation communications.

Confidentiality in Colorado is defined initially by the Colorado Dispute Resolution Act, CRS §§ 13-22-301, et seq. The general rule is that a mediator may not voluntarily disclose and may not be required to disclose any information regarding either a mediation communication or a communication provided in confidence to the mediator. Exceptions to this "non-disclosure requirement" include a) written consent of all of the parties and the mediator, b) a mediation communication which reveals the intent to commit a felony, inflict bodily harm or threaten the safety of a child under the age of eighteen years, c) the communication is required by statute to be made public, and d) in an action alleging willful or wanton misconduct of the mediator.

COMMENTS:

- The mediator should be aware of the legal limits to the non-disclosure of mediation communications and of any settlement agreement reached. The mediator should conduct the mediation so as to provide the parties the greatest protection to confidentiality afforded by law and mutually agreed to by the parties.

- Confidentiality is primarily governed by the Colorado Dispute Resolution Act, CRS § § 13-22-301, et seq. Examples of other statutes that may limit non-disclosure include the federal Administrative Dispute Resolution Act and the Freedom of Information Act, disclosure laws from other states that may have legal jurisdiction, and other Colorado statutes such as the Child Protection Act of 1987 and those that allow access to settlement information by third parties whose interests are affected.
- Most of the Colorado Dispute Resolution Act exceptions to non-disclosure are permissive. If faced with a situation where disclosure is permitted but not required, the mediator must look to his or her own conscience and reference other sources to decide whether disclosure is appropriate.
- A critical part of a mediator's role is to ensure the parties are familiar with their own and the mediators' bounds of confidentiality and non-disclosure. The mediator should address the limitations and exceptions to disclosure prior to the mediation or in the opening statement and address confidentiality in the Agreement to Mediate.
- A mediator should assume any communication in private session is meant to be kept in confidence unless the mediator is certain or has confirmed that part or all of this communication may be shared with another party in the mediation.
- The Colorado Dispute Resolution Act does not specifically address whether an attorney representing a party is bound by the statute's confidentiality requirements. However, because the lawyer is acting as the legal representative of a party, the attorney is likely bound to the same non-disclosure agreed to by the attorney's client.
- When an attorney for a party is not present at a mediation, the mediator should not assume that the party has consented to allowing the mediator to communicate with the attorney. The mediator should obtain a release which authorizes the communication. The mediator may want to include the release within the Agreement to Mediate.
- Other individuals attending the mediation (observers, experts, etc.) may not be limited by the Colorado Dispute Resolution Act in their disclosure of mediation communications. The mediator should ask observers or other attendees to sign a confidentiality agreement. Such an agreement may be incorporated into the Agreement to Mediate.
- A mediator sometimes is asked by a court for information or opinions about the dispute or the mediation. Unless authorized by a specific exception, the mediator may only report to the Court, if required, whether the parties appeared at a scheduled mediation. It is inappropriate for a mediator to report, for example, whether a party mediated in good faith.
- The Colorado Dispute Resolution Act provides that a party is not precluded from later obtaining information otherwise discoverable even though the information was first brought to the party's attention during the mediation.

- The Colorado Dispute Resolution Act allows the gathering of information for research, education and performance monitoring of the provider. Confidentiality should not be constructed to limit or prohibit effective informational gathering by responsible persons, if those persons are obligated to the same degree of confidentiality as the mediator. Under appropriate circumstances, researchers should be permitted to obtain access not only to statistical data, but with the permission of the parties and the mediator or mediation organization, to individual case files, observations of live mediations, and interviews with participants.

VI. Quality of the Process: A mediator should conduct the mediation fairly and diligently.

A mediator should work to ensure a quality process in order for mediation to be effective. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

COMMENTS:

- A mediator should agree to mediate only when the mediator is prepared to commit the attention essential to an effective mediation.
- The mediator has a duty to assess the dispute and make a determination that the case is appropriate and suitable for mediation.
- Mediators should only accept cases where they can satisfy the reasonable expectations of the parties concerning the timing of the process.
- The parties and mediator should decide who will attend the mediation. The parties and mediator may agree that others may be excluded from particular sessions or from the entire mediation process.
- In the event that the parties cannot reach an agreement even with the assistance of a mediator, it is the responsibility of the mediator to make the parties aware of the deadlock and suggest that negotiations be terminated. The mediator may encourage the parties to explore other dispute resolution options.
- A mediator should not agree to mediate a dispute or should terminate a mediation under the following circumstances: (a) the incapacity of a party; (b) a lack of commitment by the parties to the mediation; (c) the mediation is being used to further illegal conduct; (d) an inability of the mediator to remain impartial; ex (e) a lack of competence by the mediator to handle the mediation effectively.

- A mediator should postpone a mediation if any party is unable to participate due to drugs, alcohol, or other temporary physical or mental incapacity.
- If the parties reach an agreement which the mediator feels is illegal, the result of false information or the result of bad faith bargaining, the mediator should withdraw or terminate the mediation. If no confidential mediation communications are disclosed, the mediator may also inform one or more of the parties of the difficulties which the mediator sees in the agreement.

VII. Advertising and Solicitation: A mediator should be truthful in advertising and solicitation for mediation.

Advertising or any other communication with the public concerning services offered or regarding the education, training, and expertise of the mediator should be truthful. Mediators should refrain from promises and guarantees of results.

COMMENTS:

- Communication with the public should be kept to a high standard in order to educate and instill confidence in the mediation process.
- In an advertisement or other communication to the public, a mediator may make reference to meeting state, national, or private organization qualifications if the entity referred to has a procedure for certification and the mediator has been duly granted the requisite status.

VIII. Fees: A mediator should fully disclose and explain the basis of compensation, fees, and charges to the parties.

The parties should be provided sufficient information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator. If a mediator charges fees, the fees should be reasonable in light of the mediation service, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary in the community.

COMMENTS:

- It is highly recommended that arrangements regarding fees be set forth in writing.
- A mediator who withdraws from a mediation for personal reasons should return the fee to the parties unless the parties and the mediator have agreed otherwise.
- A mediator should not enter into a fee agreement which is contingent upon the result of the mediation or amount of the settlement.
- Co-mediators who share a fee should hold to a standard of reasonableness in determining the allocation of fees for each of the mediators.

- No commissions, rebates, or similar forms of remuneration should be given or received for referral of clients for mediation services.
- The mediator should not use knowledge obtained in a mediation for personal gain or advantage.

IX. Obligations to the Mediation Process: Mediators should strive to improve the practice of mediation.

Mediators have an obligation: to use their knowledge to help educate the public about mediation; to make mediation accessible to those who want to use it; to correct abuses; and to improve their professional skills and abilities.

COMMENTS:

- A mediator should cooperate in establishing and maintaining the quality, qualifications, and standards of the profession.

Adopted May 1995